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No. 10-954

IN THE SUPREME COURT OF

THE UNITED STATES

FREDDIE T. NASH

Petitioner,

-v.-

STATE OF MICHIGAN

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE INGHAM COUNTY CIRCUIT COURT

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QUESTIONS PRESENTED

Petitioner Freddie Trail Nash was convicted by jury of first degree murder and felony firearm He was sentenced by Judge Nettles-Nickerson to life plus 2 years.

The Michigan Court of Appeals affirmed and the Michigan Supreme Court denied leave to appeal Petitioner filed a Motion for Relief from Judgment which was denied by Opinion and Order issued by successor trial court Judge Thomas Brown. Leave to appeal was sought and denied by the Michigan Court of Appeals The Michigan Supreme Court denied leave to appeal.

The questions presented are:

QUESTION 1. WHETHER IRREGULARITIES IN JURY COMPOSITION AND PARTIALITY CONSTITUTED STRUCTURAL ERROR ENTITLING PETITIONER TO A NEW TRIAL.

QUESTION 2: WHETHER THE DENIAL OF ACCESS BY THE STATE COURT TO RAISE A CHALLENGE TO TESTIMONY OFFERED AS EXPERT TESTIMONY, THAT WAS NOT SUBJECTED TO THE GATEKEEPING FUNCTION SET BY THIS COURT, DENIED PETITIONER'S DUE PROCESS RIGHTS

QUESTION 3. WHETHER PETITIONER WAS PREJUDICED AND DENIED A FAIR TRIAL BY PROSECUTOR MISCONDUCT IN VIOLATING

DISCOVERY, PRESENTING IMPROPER BAD ACTS EVIDENCE, AND LEAVING PREJUDICIAL PHOTOS ON DISPLAY FOR THE JURY.

QUESTION 4. WHETHER PETITIONER WAS DENIED A FAIR TRIAL BY INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO SEEK A CHANGE OF VENUE, FAILING TO RAISE OBJECTIONS, AND NOT CONSULTING WITH AN EXPERT.

QUESTION 5. WHETHER PETITIONER WAS UNCONSTITUTIONALLY PREJUDICED BY INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

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No. _____

IN THE SUPREME COURT OF
THE UNITED STATES

FREDDIE T NASH

Petitioner,

-v-

STATE OF MICHIGAN

Respondent

PETITION FOR WRIT OF CERTIORARI

FREDDIE NASH, Petitioner, by and through his attorney, James S Lawrence, moves this Court to issue a Writ of Certiorari to review the ruling of the Ingham County Circuit Court denying Motion for Relief from Judgment entered December 29, 2008

OPINIONS BELOW

The following rulings or orders are attached (1) Order of the Michigan Supreme Court denying leave to appeal, entered October 26, 2010, (2) Michigan Court of Appeals Order denying leave to appeal, entered March 12, 2010, (3) Opinion and Order of the Ingham County Circuit Court, Michigan, denying Motion for Relief from Judgment, entered December 29, 2008, (4) Order of the Michigan Supreme Court dated January 30, 2006 denying leave to appeal, (5) Opinion of the Michigan Court of Appeals, dated September 15, 2005, affirming the convictions.

STATEMENT OF JURISDICTION

The original judgment in Ingham County, Michigan, Circuit Court was entered May 6, 2004 The Michigan Court of Appeals affirmed the convictions September 15, 2005. The Michigan Supreme Court denied leave to appeal January 30, 2006 Petitioner filed a Motion for Relief from Judgment in the Circuit Court which was denied by opinion and order entered December 29, 2008. The Michigan Court of Appeals denied leave to appeal on March 12, 2010. The Michigan Supreme Court denied leave to appeal October 26, 2010. This Court has jurisdiction under 28 U.S C. §1257 to review the final judgment.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the Constitution provides

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof; are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner Freddie Nash was convicted in the Ingham County Circuit Court, by jury, before the Hon Beverly Nettles-Nickerson of first degree murder and felony firearm in the death of Teresa Nash in Case No. 03-1003-FC. On May 26, 2004, Petitioner was sentenced to prison for life plus 2 years consecutive

An appeal of right was taken, and the Michigan Court of Appeals affirmed the conviction September 15, 2005 in docket no. 255874. The Michigan Supreme Court denied leave to appeal in docket no. 129668 on January 30, 2006 Petitioner filed a Motion for Relief from Judgment with the state trial court which was heard by the successor judge, Judge Thomas Brown, who denied the Motion on December 29, 2008. On March 12, 2010, the Court of Appeals denied leave to appeal, docket no 295819. The Michigan Supreme Court denied leave to appeal, docket no. 140950, on October 26, 2010.

Statement of Facts:

Gunshots were heard during the early morning hours of February 9, 2003 Although witnesses heard the sound, only Sandra Wolfe saw someone walking across the street, described as medium height, with a baseball cap and dark puffy down coat that was below the waist, she did not see the face (T II, 116, 122, 126-7, 135). When Mr. Hulbert looked outside his door he saw a Chevy Blazer or Suburban sitting next to a utility pole, the

vehicle engine still running (T II, 135-136). Ms Russell called 9-1-1 around 6:00 a m (T II, 120).

Police arrived and attempted resuscitation of a black female, but she died (T II, 161-162) The victim was Teresa Nash, identified by her mother, I'mogene Thomas (T II, 214). The medical examiner found she died from multiple gunshot wounds. (T III, 498). That night it had snowed up until 3.30 am, with accumulations of 1/2 to 1 inch (T II, 230, 237). The police found a vehicle involved in an accident and abandoned. (T II, 165)

Police saw a distinct boot pattern in the snow from the passenger side of the vehicle to where the body of the victim was found, then leading away from the scene. (T II, 169-170). The boot prints were photographed. (T II, 257-258, 326-327)

A dog handler tracked the prints and the scent was lost near 1328 Pierce Street. Police theorized the man got into a vehicle there (TII, 296-301).

Latent prints were lifted from the passenger door of the vehicle, however, no matches were made (T II, 248-249, 251).

Detectives tried to find boots that made the print in the photos taken and found a similar match at a Famous Footwear store, a size 13 Stacy Adams work boot, and purchased that boot and sent it to the Michigan State Police crime lab for analysis by Karl Sunı (TIII, 522).

Petitioner's home was searched and 10-15 pairs of shoes were removed, none were Stacy Adams, and all were around size 10 (T III, 525, 526) When Petitioner was arrested he was wearing size 10 FUBU tennis shoes (T IV, 590).

Chemist Karl Suni reported on his comparisons of the photos and the boots he was provided with by the police (T III, 538, 546). It was his opinion that the shoe that made the prints was a size 9 1/2, 10 or 10 1/2 based upon his measurement that the shoe making the print was 12 1/2 inches long (T III, 547, 559).

Private investigator Gorsuch also made measurements and testified the boot that made the prints measured 11 7/8 inches, contrary to Mr Suni's conclusion (T IV, 723, 727) The director of merchandising from the parent company of Stacy Adams testified that the boot print could have been made by the boot or another model, a shoe version of the trooper model (T IV, 754) A shoe that measures 11 7/8 inches would be size 9. (T IV, 746). Petitioner's shoe size was measured as being size 11 without a sock and size 11 1/2 with a sock. (T IV, 766, 770)

Jonathon Fellows testified he and his wife Alicia lived in Mason, Michigan, but their daughter was staying at Alicia's grandmother's in Lansing when they received a call around 4.45 a m on February 9, 2003, to come get their daughter as she was sick. (T III, 449). They arrived at 2427 Wadsworth and saw a blue Chevy Tahoe pull up and a black male got out, leaving the door open, and walk back and forth in front of the vehicle hooting

and hollering (T III, 449, 451, 469). They went inside to retrieve belongings, then came out and noticed the vehicle was still there, but the door was closed and they saw no one. (TIII, 454) The Fellows went back inside to retrieve their daughter and when they came out, that vehicle was gone (TIII, 455). They drove off and later saw the same vehicle had spun out of control, and later down the street they saw the same man, not identified as Petitioner, running down the street. (TIII, 457, 472).

Petitioner had been married to Teresa Nash previously, but they were divorced, and they did have one child together. (T II, 216). There had been a disagreement over child support between Ms. Nash and Petitioner. (T III, 478, 480). Petitioner retained counsel, attorney Cynthia Law, and received a favorable ruling after a referee hearing held January 27, 2003, less than 2 weeks before Ms. Nash's demise. (T V, 773-774). Petitioner was not angry or upset over the matter, and was pleased he prevailed, with reduction of costs by over half. (T V, 774-775).

Ms Nash had other children, including her daughter Ra'eese Cannon, who was 12 in 2003. (T III, 373) After the death of Teresa Nash, the children moved in with grandmother I'mogene Thomas. (T III, 397)

A month and a half after the death, Petitioner, along with his brothers and mother, went over to Ms. Thomas' house to pick up his child Freddie Taysia Nash (T III, 423). Petitioner answered a phone call. (T III, 424). After they left, Ra'eese Cannon came in the room and told her grandma, Ms. Thomas,

that she had heard Petitioner's voice and phone tone before, the night her mother died. (T III, 425) Ms Thomas then called the detectives involved in the case (T III, 425)

Ra'eese Cannon was awakened by voices she heard from downstairs on the early morning hours of February 9, 2003 (T III, 382). She told the jury she recognized the voices as being her mother's and Petitioner's, though she never saw who was actually downstairs with her mother. (TIII, 383, 400). Ra'eese heard a phone ring, but the ring was not one she was used to hearing and heard the phone being answered (T III, 387-388) Later, Teresa Nash came upstairs and got her purse and keys and then left (TIII, 392) Ra'eese went back to sleep and was awakened by gunshots (T III, 393)

A month and half later Ra'eese claimed Petitioner's voice and phone were the same she heard the night her mother was killed (T III, 399).

Detective Gomez testified that Petitioner could have been in the area of the scene of crime at the relevant time, but the engineer from Nextel testified that even with all the information provided one still could not tell an exact address of where the caller was. (TIV, 683-684)

REASONS FOR GRANTING THE WRIT

QUESTION 1 IRREGULARITIES IN JURY COMPOSITION AND PARTIALITY CONSTITUTED STRUCTURAL ERROR ENTITLING PETITIONER TO A NEW TRIAL.

Petitioner Freddie Nash was convicted at a jury trial of first degree murder and felony firearm It came to the court's attention that during deliberations one of the jurors went home but the other jurors remained behind Defense counsel moved for a mistrial based on proceedings taking place with only 11 jurors. This was denied. (T 886-888, 893-898).

The record does not identify which juror had been missing. The record does reflect that the next day all 12 jurors assured the judge that no deliberations took place while the juror was missing The record does not reveal how the juror who was not present during the period was able to answer that question. Nevertheless, the judge made it obvious what answers to give to keep this trial going, and jurors gave the judge the desired answers, including the juror who was not present and had no personal information about what happened in his or her absence

We submit failing to grant the mistrial constituted reversible error, as deliberations with 11 jurors impermissibly infringed on the federal constitutional right to jury trial, even though the missing juror returned another day

In a criminal case, "The accused shall enjoy the right to.. trial by an impartial jury " U S Const , Amend VI Being "fundamental to the American scheme of justice," *Duncan v Louisiana*, 391 U S 145, 149 (1968), the right is binding on the states *Turner v Louisiana*, 379 U S. 466 (1965)

While the defendant can waive the right to a unanimous verdict by 12 jurors if done knowingly, voluntarily and intelligently, *Patton v United States,* 281 U S 276 (1930), *Boykin v Alabama,* 395 U S 238 (1969), *United States v Martin,* 704 F.2d 267 (6th Cir. 1983), this Petitioner did not. Proceedings with 11 jurors cannot be sustained without a valid waiver. This is a structural error. *Sullivan v Louisiana,* 508 U S. 275 (1993).

The fact is the jurors were there for the purpose of deliberating, and it defies reason and logic to think that they would remain in the room into the evening after one juror left, yet not discuss the case, especially where they were not so instructed

As the Court noted in *McKoy v North Carolina,* 494 U.S 433 (1990) (opinion of Scalia, J) "A jury, of course, is not a collection of individuals who are asked separately about their independent views, but a body designed to deliberate and decide collectively."

The State trial court, in denying this issue, wrongfully looked to whether prejudice could be shown (Opinion 4), which is not the standard for structural errors.

The State trial court denied this in part on the fact that the judge instructed the jurors to begin deliberations "from scratch" (Opinion, 4) An instruction to wipe from one's head everything that had already been discussed, and resume discussions without thinking of or referring to anything already said, is form without substance. Not one individual in 1000 would be capable of following such instructions The judge herself could not do it The following day, the judge answered the written questions from the day before (T 897-898). The questions the jury sent the day before were part and parcel of the jury deliberations purportedly being discarded, on the instructions of the very judge not discarding them. The instruction cured nothing.

In *United States v Curbelo*, 343 F.3d 372 (4th Cir, 2003), the Court held that where a defendant does not stipulate to proceeding with 11 jurors, it is impossible to quantify the effect, and such errors are considered structural errors

The inability to quantify the effect of the error is what distinguishes most trial errors from structural errors. Consider the discussion by this Court in *Neder v United States*, 527 U.S. 1, 8-9 (2009):

> "The error at issue here — a jury instruction that omits an element of the offense — differs markedly from the constitutional violations we have found to defy harmless-error review. Those cases, we have explained, contain a "defect affecting the framework within which the trial proceeds, rather

> than simply an error in the trial process itself" *Fulminante*, supra, at 310 Such errors "infect the entire trial process," *Brecht v Abrahamson*, 507 U S. 619, 630 (1993), and "necessarily render a trial fundamentally unfair," *Rose*, 478 U.S., at 577

A structural error is not subject to being made harmless via later instructions In this case, the best showing of prejudice possible, the fact that the judge herself could not follow the impossible instructions she gave the jury, would be the most any defendant could ever come up with As explained in *Neder*, the nature of the error renders the results unreliable and no showing of prejudice is needed

> "Put another way, these errors deprive defendants of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence and no criminal punishment may be regarded as fundamentally fair "

There was another impropriety During jury selection, the parties read off the names of witnesses, including Officer Joel Mires (T 6). The judge asked the prospective jurors to note if they knew any of the witnesses, then to inform the court when they got in the jury box. (T 8).

On day 3, witness Mires informed the court that he recognized Juror 5, Edward Wurm, saying "we've been friends since elementary school " The judge was concerned Juror Wurm had not disclosed that, yet, did not excuse the juror. (T 354).

Later, Sam Ostrander informed the court his friend Andy Thomas, relative of the deceased Teresa Nash, came to his house and said one of the jurors was a friend of his and assured him he would make sure the jury would find Petitioner Nash guilty regardless (T 782-792). He said Andy Thomas told him that he and the juror hang out every day (T 789) He said, "It's his cousin that's dead, okay, and he knows this juror on the jury box, and since he knows it was his cousin, he said he's going to find him guilty regardless if he's not guilty. No ifs, ands, and buts about it." (T 791) Juror 15, Joel Post, said he knew Andy Thomas from Lansing Christian, but had not spoken with him for years. (T 806)

Michael Andrew Thomas testified that he was the first cousin of the deceased, Teresa Nash He admitted telling Sam that "I think we got a juror that we know on the jury bench." (T 816) He stated he had not had contact with the juror for at least two months (T 817).

However, Mr. Thomas stated that the name of the man they knew was Doug (T 814), which matched Douglas Blankenberg, juror no. 6, not juror Post.

A defendant has a Sixth Amendment right to "a verdict by impartial, indifferent jurors" to avoid any bias or prejudice that might affect the defendant's right to a fair trial *Dyer v Calderon*, 151 F.3d 970, 973 (9th Cir.1998) (en banc). This right is so fundamental that the Second Circuit has held that the right to an impartial factfinder was "inherently unwaivable" because to hold

otherwise would result in "fundamentally unfair" proceedings against the defendant *United States v Nelson*, 277 F.3d 164, 205 (2d Cir 2002)

The friendship relationship of Juror 5 with a police witness in the case, and the friendship relationship of Juror 15 with the cousin of the deceased, leading to false statements and failures to disclose the relationships, required removal of the jurors No trial could fairly proceed where a juror had promised his friend that the guy on trial was going to be convicted no matter what.

The State court wrongfully looked to whether prejudice could be shown (Opinion 5), which is not the standard for structural errors Because an impartial jury is so fundamental, "[d]oubts regarding bias must be resolved against the juror" *United States v Gonzalez*, 214 F 3d 1109, 1114 (9th Cir. 2000) The nature of this error was discussed in *Dyer v Calderon*

> "The presence of a biased juror cannot be harmless, the error requires a new trial without a showing of actual prejudice. See *United States v Allsup*, 566 F.2d 68, 71 (9th Cir. 1977). Like a judge who is biased, see *Tumey v Ohio*, 273 U.S 510, 535 (1927), the presence of a biased juror introduces a structural defect not subject to harmless error analysis See generally *Arizona v Fulminante*, 499 U S 279, 307-10 (1991)."

The Court also erred by not finding prejudice. Ra'Eesa Cannon, the only identifying witness, testified only to a voice

identification, reported weeks later, not a visual identification. While that type of testimony could be persuasive in some cases, it would not universally be so. This is the very type of case where the bias or incentive of even a single juror could have enormous impact on the outcome

Errors concerning composition of the jury and actions of the jury are structural errors which do not require the defendant to make any showing of prejudice. *Brecht v Abrahamson*, 507 U S. 619 (1993).

Petitioner submits that these irregularities involving both the deliberative process and deceit in the composition of the jury constitute errors in that limited group known as structural errors. As this Court observed last term in *United States v Marcus*, 08-1341 (U.S 5-24-2010):

> "But 'structural errors' are 'a very limited class' of errors that affect the "'framework within which the trial proceeds,'" *Johnson*, supra, at 468 (quoting *Arizona v Fulminante*, 499 U. S. 279, 310 (1991), such that it is often "difficul[t]" to "asses[s] the effect of the error," *United States v Gonzalez-Lopez*, 548 U. S. 140, 149, n. 4 (2006). See *Johnson*, supra, at 468-469 (citing cases in which this Court has found "structural error," including *Gideon v Wainwright*, 372 U. S. 335 (1963) (total deprivation of counsel), *Tumey v Ohio*, 273 U. S. 510 (1927) (lack of an impartial trial judge); *McKaskle v Wiggins*, 465 U S. 168 (1984) (right to self-representation at trial); *Waller v Georgia*, 467 U. S. 39 (1984) (violation of the right to a public trial); and *Sullivan v*

Louisiana, 508 U. S 275 (1993) (erroneous reasonable-doubt instruction))

This Court should grant review and hold that jury composition and jury impartiality irregularities each constitute structural error, and did so in this case, and order a new trial at which the jurors are impartial and do not cover up their ties to police witnesses and the family of the deceased, and do not make commitments to family members of the deceased that the defendant will be convicted, and at which the jurors deliberate as a body, with all of them present

QUESTION 2· THE DENIAL OF ACCESS BY THE STATE COURT TO RAISE A CHALLENGE TO TESTIMONY OFFERED AS EXPERT TESTIMONY, THAT WAS NOT SUBJECTED TO THE GATEKEEPING FUNCTION SET BY THIS COURT, DENIED PETITIONER'S DUE PROCESS RIGHTS

The state trial court ruled incorrectly that the issue of "allowing expert testimony under M R E 702" was "decided against the Defendant in a prior appeal." (Opinion, 7). The opinion in *People v Freddie Nash,* unpublished Michigan Court of Appeals (No. 255874, September 15, 2005) plainly lists 2 issues sufficiency of the evidence of premeditation, and whether to grant a new trial based on newly discovered evidence The Court did not decide a question of whether the testimony of Karl Suni was wrongfully admitted at trial

In a criminal case, due process is violated when a state's procedures "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v California,* 505 U S 437, 445 (1992) (quoting *Patterson v New York,* 432 U.S 197, 202 (1977)). Criminal defendants must be given "an adequate opportunity to present their claims fairly within the adversary system " *Ake v Oklahoma,* 470 U.S 68, 77 (1985) Ruling that an issue cannot be heard because it was decided before, when it was not decided before, denied Petitioner an adequate opportunity to present his claims.

The underlying legal error also denied due process. The testimony in question was by Karl Suni of the Michigan State Police lab. He received a Master of Science degree in microchemistry from Michigan State and worked in the microchemistry unit.

Microchemistry is·

> "Chemistry that deals with minute quantities of materials, frequently less than one milligram in mass or one milliliter in volume " The American Heritage Dictionary of the English Language, Fourth Edition (2009).
>
> "chemistry dealing with the manipulation of very small quantities for purposes of preparation, characterization, or analysis." Merriam-Webster's Medical Dictionary, 2002

Mr. Suni stated (T 537):

> "In the microchemistry subunit we analyze things on a microscopic scale such as paint, glass, fibers, explosive residue We also in that subunit analyze footwear and tire impressions "

The state police can organize their units any way they wish. But the mere fact that they have joined microchemistry with footwear and tire impressions into a single unit does not make a microchemist an expert in other fields The prosecutor offered Sum as an expert in microchemistry, but then used him as an expert in another field, footwear impressions.

Without any demonstration that he was employing a technique recognized as scientifically reliable, he testified that there was "no question" that the submitted boots had the "same tread" as the footprints in the snow, and that "we can say that it's a Stacey Adams boot." (T 543) What branch of chemistry is that?

M R E 702 provides that the judge is to allow only expert testimony based on reliable techniques, by qualified experts.

A chemist is not "a witness qualified as an expert by knowledge, skill, experience, training, or education" to testify about footwear identification He should not have been permitted to give this testimony outside his qualifications

Moreover, the chemist should not have been permitted to testify to a purported scientific technique that was not shown to meet the requirements of *Daubert v Merrell Dow*

Pharmaceuticals, Inc, 509 U.S 579, 113 S.Ct. 2786, 125 L.Ed 2d 469 (1993) In *Gilbert v DaimlerChrysler Corp.*, 470 Mich 749 (2004), the Michigan Supreme Court citing to *Daubert* held the trial judge must exclude from evidence scientific testimony that has not been established by its proponent to be reliable. In *People v Unger,* 278 Mich. App. 210 (2008), the Court applied this rule to criminal cases.

We submit that the trial court failed in its responsibilities on this occasion, by allowing the chemist to testify about something other than chemistry, and by accepting "footwear identification" as a scientifically valid method of determining facts, both of which are contrary to *Daubert*

Petitioner properly presented a challenge to his conviction in a Motion for Relief from Judgment under M.C.R 6 500 et. seq. The state courts denied due process by precluding review of this issue and making an objectively unreasonable finding that this issue had been raised on direct appeal where the record demonstrates that is not true.

QUESTION 3. PETITIONER WAS PREJUDICED AND DENIED A FAIR TRIAL BY PROSECUTOR MISCONDUCT IN VIOLATING DISCOVERY, PRESENTING IMPROPER BAD ACTS EVIDENCE, AND LEAVING PREJUDICIAL PHOTOS ON DISPLAY FOR THE JURY

Petitioner proceeded to trial on charges of murder and the prosecutor withheld exculpatory evidence until trial which

precluded any testing or challenge to the validity of inculpatory evidence Petitioner submits this prosecutorial misconduct denied a fair trial.

The case against Petitioner was circumstantial, based upon spurious claims that boots, not owned by Petitioner, but somehow attributed to Petitioner, left prints in the snow leading away from the scene of the crime At trial, the victim's underage daughter claimed that she heard a voice and phone ring tone just before her mother died which she told the jury was similar to what she heard months later when Petitioner was at her grandmother's house

As the United States Supreme Court in *Wardius v Oregon*, 412 U.S 470 (1973) observed

> "Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, but cf. *Brady v Maryland*, 373 U.S. 83 (1963), it does speak to the balance of forces between the accused and his accuser. Cf. *In re Winship*, 397 U.S 358, 361-364 (1970) "

When the defendant withholds evidence from the prosecutor to obtain a clear tactical advantage, the conduct merits the strongest response. See *United States v Hamilton*, 128 F 3d 996 (6th Cir. 1997):

> "In *Michigan v Lucas*, 500 U.S. 145 (1991), the Supreme Court reiterated its holding in *Taylor* and stated that when a discovery violation amounts to willful misconduct and is designed to obtain a

> tactical advantage, regardless of whether prejudice to the prosecution could have been avoided by a lesser penalty, the severest sanction is appropriate "

Due process and equal protection demand fair and similar treatment. The Supreme Court has long held that due process of law and basic fairness demand that the most reliable method of identification possible be used in a criminal case See *Simmons v United States*, 390 U.S 377, 383-384 (1967).

Wharton concluded that

> "The qualification of the witness to express an opinion as to the identity of the voice must be shown as based either on familiarity with the speaker, or upon some peculiarity in the voice which would make it likely that the witness could distinguish and identify the voice in question " 1 Wharton's Criminal Evidence, § 183, p 365.

Michigan has also recognized the need for reliability testing of voice identification *People v Bozzi*, 36 Mich. App. 15(1971), lv den 386 Mich. 775 (1971) noted with approval the language of *State v Karas*, 43 Utah 506, 136 P. 788 (1913):

> "Undoubtedly voice is a competent means of identification, and one by such means alone may be sufficiently identified. In some instances identification by such means may be as ponderous as identification by sight But the testimony should be reasonably positive and certain, and based upon some peculiarity of the person's voice, or upon sufficient previous knowledge by the witness of the

> person's voice'" 36 Mich App. 19 In accord *People v Murphy*, 282 Mich App 571, 584 (2008) "

Here the prosecutor introduced voice identification and ring tone identification without informing defendant of this evidence before trial, thus preventing any hearings or line-ups to determine the reliability of a young girl's ability to differentiate and distinguish voices and ring tones.

There were no line-ups or voice exemplars involved. Nor was there anything in the testimony identifying anything peculiar or distinctive about Petitioner's voice upon which a distinction between voices could have been made As a result of this prosecutorial misconduct, unreliable and highly prejudicial evidence was presented to the jury poisoning any reasonable chance of a fair and impartial jury. A single 5 minute testing of speaking by Petitioner and a few others under controlled conditions could have blown this identification testimony out of the water, making a conviction impossible, or highly unlikely. The prosecutor withheld this "identification" evidence to secure a tactical advantage

The inherently unreliable identification evidence from the decedent's minor child unfairly prejudiced Petitioner. See *Old Chief v United States,* 519 U.S 172 (1997):

> "'Unfair prejudice' . . means an undue tendency to suggest decision on an improper basis,

commonly, though not necessarily, an emotional one."

Adding to the unfairness, the prosecutor introduced bad character information and improper argument to the jury. A conviction should be reversed where prejudicial and improper argument by the prosecutor has the effect of denying the defendant a fair trial *United States v McLain*, 823 F 2d 1457 (11th Cir. 1987); *Bruno v Rushen*, 721 F.2d 1193 (9th Cir. 1983) The standard is whether the conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v DeChristoforo*, 416 U.S. 637 (1974)

Petitioner was charged with murder of his ex-wife In an effort to show motive, the prosecutor introduced testimony from a Friend of the Court employee, claiming Petitioner was angry with the victim over child support matters The prosecutor's theory was that the Friend of the Court dispute was unfavorable to Petitioner, thus motivating Petitioner to want to murder his ex-wife.

The trial court ruled this testimony was permitted because it dealt with motive Petitioner submits the ruling was objectively unreasonable and the evidence unfairly prejudiced Petitioner. If Petitioner had been unsuccessful in resolving the child support matters with the victim, then evidence about what happened with the Friend of the Court may have been admissible as demonstrating motive. However, Petitioner ***WAS***

SUCCESSFUL in his objections to the Friend of the Court and obtained a favorable ruling there (T 773-775)

Essentially the prosecutor deceived the jury, stating that Petitioner was unsuccessful in obtaining relief from the Friend of the Court, and therefore had a motive to murder the victim The evidence did not support motive, instead, the evidence, and its twisting by the prosecution, was used by the prosecution to paint Petitioner as an unsympathetic, "bad" person

In *Michelson v United States,* 335 U.S. 469, 475-476 (1948), the United States Supreme Court ruled "'The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime "

As the Court held in *United States v Acosta-Cazares*, 878 F 2d 945 (6th Cir 1989)

> "evidence of criminal character or propensity is excluded because the jury might convict the defendant for the conduct proving propensity rather than for the offense for which he is on trial."

Even if established by evidence, fundamental fairness prohibits "the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case such as motive,

opportunity or knowledge " *Huddleston v United States*, 485 U.S 681, 685 (1988)

As the Court noted in *United States v Schrock*, 855 F.2d 327 (6th Cir. 1988), quoting from McCormick on Evidence, §185, at 545 (1984

> "Prejudice can arise . from facts that arouse the jury's hostility or sympathy for one side without regard to the probative value of the evidence " See also *Shepard v United States*, 290 U.S. 96, 54 S Ct 22, 78 L Ed 196 (1933), *United States v Merriweather*, 78 F.3d 1070 (6th Cir. 1996).

The prosecutor's incessant argument to the jury that Petitioner was angry and out of control over unfavorable Friend of the Court rulings was highly prejudicial, inadmissible, and irrelevant. His alleged violent character had no legitimate tendency to prove him guilty, other than by the forbidden means of inferring from his character that he committed the charged act

See *Kincade v Sparkman*, 175 F.3d 444 (6th Cir. 1999), holding that the Petitioner was entitled to Habeas Corpus relief because the prosecutor, in argument before the jury, called him a "professional burglar," suggesting repeated commission of other similar crimes. As the Court noted in *Kincade*: "The remarks were made deliberately. Any prosecutor should know that he has stepped far over the line when he makes this type of closing argument "

The submission and admission of the evidence undermined any legitimate confidence in the trial process and the introduction of this evidence "is so extremely unfair that its admission violates fundamental conceptions of justice" *Dowling v United States,* 493 U.S 342, 352 (1990)

The prosecutor deliberately and repeatedly left on display to the jury enlarged photographs of the deceased showing her fatal injuries (T 167, 192, 200, 214). Each photo was left on display until the projector was needed for another exhibit Photos from the autopsy detailing each wound and stages of the autopsy were also displayed to the jury, (T 503-507), being projected during the entirety of Dr DeJong's testimony.

The cause of death in this case was multiple gunshot wounds. (T 498). There was no probative value to immersing the jury in bloody photos. The only question for the jury was who fired the shots, a question not answered in any way by the photos. However, the photos would have the natural effect of disgusting and horrifying the jurors, playing on their sympathies, leading to a conviction of the Petitioner whether the evidence against him was strong or not.

These circumstances have led the Michigan Supreme Court in other cases to find that the only reasonable conclusion for the use of the photographs was to incite the jury:

> "Defendant's appropriately filed notice of alibi and his consistent reliance on alibi as his defense, coupled with the unrebutted proof that [the

> murder victim] was killed by a shotgun blast, rendered the use of these photographs neither substantially necessary nor instructive to show material facts or conditions We can find no other reason for their use than to excite passion and prejudice" *People v Falkner*, 389 Mich. 682 (1973).

As in *Falkner*, the photos were not relevant or material to any fact in controversy

Since its actual probative value on any contested matter is zero, clearly undue weight would be given by a jury. Why show the jurors gruesome photos, if the intent is not to provoke an emotional response? Why do it where the cause of death is obvious and uncontested, and the photos have no bearing on who did the shooting?

Petitioner endorses the reasoning of *People v Jerry Smith*, 122 Mich App. 106 (1982), a case strikingly similar to this one:

> "We find that these photographs were neither substantially necessary nor instructive to show a material fact and were introduced only to excite the jury's passion and prejudice. Admitting these photographs caused a manifest injustice. Accordingly, we reverse
>
> The photographs were used twice at trial and only to establish that the extensive wounds they depicted were those of Thomas Brooks. The nature of the wounds, however, did not serve to

rebut defendant's alibi defense, nor was it relevant to any element of first-degree murder

The prosecutor's use and display of these photos prejudiced Petitioner, denying him a fair trial, and rendering the verdict unreliable.

It was also improper and a denial of due process for the prosecutor to argue facts not in evidence. *Berger v United States*, 295 U.S. 78 (1935), *United States v Leon*, 534 F.2d 667, 679 (6th Cir. 1976), *United States ex rel Shaw v DeRobertis*, 755 F.2d 1279 (7th Cir. 1985); *United States v Latimer*, 511 F.2d 498 (10th Cir. 1975), *United States v Whitmore*, 480 F.2d 1154 (D.C. Cir. 1973), *United States v Gonzalez-Vargas*, 558 F.2d 633 (1st Cir. 1977), *United States v Lamerson*, 457 F.2d 371 (5th Cir. 1972); U.S. Const., Amend. XIV.

The prosecutor knew that Petitioner had been successful in resolving his Friend of the Court matters involving the decedent; yet the prosecutor made claims of bad blood between Petitioner and victim based upon the improper suggestion that Petitioner was unsuccessful in lowering child support and arrearage, known by the prosecutor to be untrue.

Here, as in *United States ex rel Shaw v DeRobertis*, 755 F.2d at 1281, "The prosecutor violated the fundamental rule, known to every attorney, that argument is limited to the facts in evidence."

For the prosecutor to provide the jury with evidence that the witnesses did not provide the jury is for the prosecutor to

unlawfully assume the role of witness. *Berger v United States*, supra Because the defendant cannot cross-examine a prosecutor who does not take the stand, such actions by the prosecutor violate the fundamental right of cross-examination The right of a defendant to cross-examine the witnesses against him is recognized as being the most fundamental of rights. U.S Const., Amend. VI, U.S. Const., Amend. XIV; *Crawford v Washington*, supra, *Davis v Alaska*, 415 U S. 308 (1974); *Lee v Illinois*, 476 U S. 530 (1986)

A conviction should be reversed where prejudicial and improper argument by the prosecutor has the effect of denying the defendant a fair trial. *United States v McLain*, 823 F.2d 1457 (11th Cir 1987), *Bruno v Rushen*, 721 F.2d 1193 (9th Cir. 1983). The standard is whether the comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v DeChristoforo*, 416 U S 637 (1974).

If the argument is sufficiently improper, it may be cause for reversal even without an objection. *United States v Harris*, 523 F 2d 172 (6th Cir. 1973), *Malley v Manson*, 547 F.2d 25 (2d Cir. 1976).

There is no consistently applied rule denying relief for failure of defense counsel to object and therefore such failure can not be used as the basis for procedural default in federal Habeas Corpus. *Johnson v Mississippi*, 486 U.S. 578, 587 (1988).

Numerous Michigan cases have granted relief to defendants based on improper prosecutor argument, where the defendant failed to object Therefore, Petitioner is not foreclosed from review even though his attorney failed to object M R E. 103(d); *People v Knox*, 469 Mich 502 (2004), *People v Strong*, 404 Mich. 357 (1978).

We submit that the improper argument, which brought matters to the jury not found in the testimony, was an extraneous influence, material to what the jury was considering.

Under *Cook v Bordenkircher*, 602 F.2d 117 (6th Cir 1979), because the prosecutor's remarks had "a tendency to mislead the jury," because they encouraged the jury to consider alleged "facts" which were not in evidence, and because the remarks were "deliberately placed before the jury," 602 F.2d at 120, reversal is required Under *Brecht v Abrahamson,* supra, the error "had a substantial and injurious effect or influence in determining the jury's verdict "

This Court should grant the writ and order a new trial at which the jurors are not subjected to prolonged exposure, or any exposure, to gruesome photos that have no bearing on who committed this fatal shooting, or exposed to prior acts evidence, and that the prosecutor must argue only evidence that was introduced, and disclose requested materials.

QUESTION 4. PETITIONER WAS DENIED A FAIR TRIAL BY INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO SEEK A CHANGE OF VENUE, FAILING TO RAISE OBJECTIONS, AND NOT CONSULTING WITH AN EXPERT

Petitioner makes three separate claims of ineffective assistance of counsel.

A. Failure to Seek Change of Venue.

Petitioner was charged with the death of his former wife The newspapers and other media had been running stories about the case, including numerous articles emphasizing how the victim left six children behind and had been trying so hard to provide for her family. (T I, 21-22, 65-66). Articles about Petitioner, the victim, and the case ran as recently as the day before jury selection (T I, 25)

The effect of the publicity was noted by one prospective juror who in answering if information learned from the articles would interfere with deliberations, the juror said: "probably, especially if it's brought up during the testimony." (T I, 24). Petitioner submits trial counsel was constitutionally deficient in not seeking a change of venue and/or more extensive voir dire to ferret out extraneously caused bias Found in the Appendix are some newspaper articles discussing the killing and charges.

"A criminal defendant is entitled to "a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v Dowd*, 366 U.S. 717

(1961) A defendant who claims that media coverage tainted the jury may prevail by showing either "presumptive prejudice" or "actual prejudice." *Joseph v Coyle*, 469 F 3d 441, 468 (6th Cir 2006).

If presumptive prejudice does not apply, courts must consider whether the defendant was actually prejudiced. The court is to examine the voir dire transcript and the extent and nature of the publicity to determine whether a fair trial was impossible. *White v Mitchell*, 431 F.3d 517, 532 (6th Cir.2005) Prospective jurors being familiar with the facts and issues in the case does not automatically disqualify them as biased *Foley*, 488 F.3d at 387. "The relevant question is 'did [the] juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." Id (quoting *Patton v Yount*, 467 U S. 1025, 1036 (1984)).

Although the court did remove some jurors for cause, the standard imposed by the trial court was ineffectual Consider Juror # 15 of the array who flat out indicated that the news coverage interfered with her ability to deliberate. She was not removed for cause, but only by peremptory challenge. (T I, 24, 61) Despite the admitted lack of impartiality of this juror, the trial court considered this juror to be impartial and unbiased

This was not an isolated incident. Consider juror #12, who had read the articles in the papers and had seen the television reports, and when asked about keeping an open mind,

he indicated. ""to be completely unbiased with this case, I would be real hard to." (T I 19) The trial court did not remove this juror for cause and the defense had to use another peremptory challenge to remove this juror. (T I, 78). Left on the jury was juror Collins who read the paper everyday and was familiar with the case from reading about it and watching television news reports. (T I, 65-65). Why should any criminal defendant, in the United States of America, be tried by a juror who might have some problems keeping an open mind?

In *Sheppard v Maxwell*, 384 U.S 333 (1966), the Court stated:

> "Due process requires that the accused receive a trial by an impartial jury free from outside influences Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measure to ensure that the balance is never weighed against the accused "

Petitioner Nash's trial should not have been held in Ingham County. The inquiry should focus on the extensive publicity, the pervasiveness of the community discussions, and the extreme familiarity of the case to the jurors, to the point where they could recognize Petitioner on sight To allow the jurors' conclusions to overcome everything else the jurors said is to eliminate the requirement of fair and impartial juries altogether. To use an extreme example, under the standard employed here,

even if in a county where no jury could be seated without one or more members of the Ku Klux Klan to sit in judgment of an African-American defendant, a change of venue still could not be had if enough jurors declared they could set that aside and be fair. Consider *Miller v Webb*, 385 F 3d 666 (6th Cir. 2004).

> "An affirmative statement of impartiality is required to ensure that a juror is unbiased, but such a statement alone is not the determining factor. A trial court must still determine, from the context, whether such a statement is believable" See also *Wolfe v Brigano*, 232 F 3d 499, 502 (6th Cir 2000) ("A court's refusal to excuse a juror will not be upheld 'simply because the court ultimately elicits from the prospective juror a promise that he will be fair and impartial . . '" (quoting *Kirk v Raymark Indus., Inc*, 61 F.3d 147, 156 (3d Cir. 1995) " at 677 n 2

Juries "are extremely likely to be impregnated by the environing atmosphere" *Groppi v Wisconsin*, 400 U.S 505 (1971). "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man" *Irvin v Dowd*, supra

Allowing Petitioner to be tried in Ingham County saturated with this type of publicity about the case was an abuse of discretion and unreasonable.

There is a presumption of prejudice from jurors being exposed to facts not in evidence, *United States v Swinton*, 75 F.2d 374 (8th Cir. 1996), which applies even to exposure of a

single juror. *United States v Hall*, 116 F.2d 1253 (8th Cir 1997). Most of the articles' information was inadmissible and not admitted at the trial

Errors regarding composition of the jury are structural errors, and therefore harmless error analysis is inappropriate. *Brecht v Abrahamson*, supra; *McGurk v Stenberg*, 163 F 3d 470, 475 (8th Cir. 1998) (finding that when counsel's deficient performance causes a structural error, reversal is automatic without any harmless error analysis, because prejudice is presumed).

Given the exceptionally light nature of the inculpatory evidence, i.e., a voice and "ring tone" identification alone by an influenced witness weeks later, an unprejudiced jury, not contaminated with all the negative information supplied to the press, might well have found reasonable doubt

B. Failures to Object.

Trial counsel was constitutionally deficient in not objecting to improper conduct and introduction of evidence by the prosecutor, cited in this petition. The critical failure of an attorney to object can be ineffective assistance of counsel if it deprives the defendant of an opportunity for dismissal of the case, a favorable verdict, or for success on appeal. *Gravley v Mills*, 87 F.3d 779 (6th Cir. 1996), *Kowalak v United States*, 645 F.2d 534, 537-538 (6th Cir. 1981), *Corsa v Anderson*, 443 F. Supp. 176 (ED Mich. 1977).

Allowing damaging information to come before the jury without objection, where the evidence could have been excluded, is ineffective assistance of counsel *Rickman v Bell*, 131 F.3d 1150 (6th Cir. 1997); *Groseclose v Bell*, 130 F.3d 1161 (6th Cir. 1997); *Ward v United States*, 995 F.2d 1317 (6th Cir 1993).

Trial counsel's performance can be deemed deficient based upon the failure to object to highly prejudicial remarks heard by the jury. *United States v Rusmisel*, 716 F.2d 301 (5th Cir. 1983); *Seehan v State of Iowa*, 37 F.3d 389 (8th Cir 1994); *Weygandt v Ducharme*, 774 F.2d 1491 (9th Cir 1985)

C. Failure to consult with and introduce testimony from expert.

Petitioner was convicted on the inherently unreliable evidence of a 12 year old, who was subjected to highly suggestive corrupting influences as weeks went by without an arrest. The jury was never made aware of the suggestive and unreliable nature of this testimony because trial consel failed to consult with and retain an expert.

Effective assistance of counsel requires that counsel make reasonable investigations and adequately prepare for trial *Rompilla v Beard*, 545 U.S. 374 (2005); *Wiggins v Smith*, 539 U.S 510 (2003); *Kimmelman v Morrison*, 477 U S. 365 (1986) Part of effective assistance of counsel is to present evidence in support of theories advanced, *Foster v Lockhart*, 9 F.3d 722 (8th Cir. 1993).

In Habeas Corpus it has been recognized that the failure to consult with or retain or call to the witness stand an expert witness was ineffective assistance of counsel. *Sims v Livesay*, 970 F.2d 1575 (6th Cir. 1992), *Leonard v Michigan*, 256 F Supp 2d 723 (WD Mich , 2003); *Holsomback v White*, 133 F 3d 1382 (11th Cir. 1998), *Pavel v Hollins*, 261 F 3d 210 (2d Cir. 2001); *Lindstadt v Keane*, 239 F 3d 191 (2d Cir. 2001).

It is not necessary to show that the evidence not pursued by counsel would have changed the result. A reviewing court should focus on whether counsel's alleged errors "have undermined the reliability of and confidence in the result" *McQueen v Scroggy*, 99 F.3d 1302, 1311 (6th Cir. 1996). "On balance, the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result." Id at 1311-12 (quoting *Strickland*, 466 U.S. at 686, 104 S.Ct. 2052). See also *Kyles v Whitley*, 514 U.S. 419, (1995).

This Court should grant review and then rule that Petitioner is entitled to a new trial before a constitutionally drawn jury and represented by constitutionally effective counsel.

QUESTION 5. PETITIONER WAS UNCONSTITUTIONALLY PREJUDICED BY INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

A criminal defendant is entitled to effective assistance of counsel *Strickland v Washington*, 466 U S 668 (1984), *Beasley v United States*, 491 F.2d 687 (6th Cir 1974); U.S Const , Amend VI. This right includes effective assistance of counsel on appeal *Evitts v Lucey*, 469 U.S. 387; 105 S Ct 830, 83 L Ed.2d 821 (1985); *Penson v Ohio*, 488 U S. 75 (1988)

Under *Evitts v Lucey*, 469 U S at 396:

> "nominal representation on an appeal as of right--like nominal representation at trial--does not suffice to render the proceedings constitutionally adequate "

In *Beasley v United States*, supra, the Court stated:

> "Defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a timely manner."

The critical failure of an attorney to object or raise an issue can be ineffective assistance of counsel if it deprives the defendant of an opportunity for dismissal of the case or for success on appeal. *Gravley v Mills*, 87 F.3d 779 (6th Cir 1996), *Kowalak v United States*, 645 F.2d 534, 537-538 (6th Cir 1981); *Corsa v Anderson*, 443 F. Supp. 176 (ED Mich. 1977)

We submit there was ineffective assistance of appellate counsel regarding the failure of the appeal attorney to raise the issues raised herein On direct appeal, only issues of sufficiency of the evidence and newly discovered evidence were raised To

properly review this claim, it is necessary to consider the merits of the issues raised before deficiency of appellate counsel's performance can be assessed See *Willis v Smith,* 351 F.3d 741 (6th Cir, 2003), ("Thus, in order to determine whether cause exists [because of ineffective assistance of appellate counsel]. we must, ironically, consider the merits" of the claims not raised on direct appeal.).

It is reasonably probable that Petitioner would have gotten a reversal on his appeal of right, but for the inaction of appellate counsel See *Mapes v Coyle*, 171 F.3d 408 (6th Cir. 1999), finding ineffective assistance of appellate counsel where counsel omitted issues that were "significant and obvious "

In *Mason v Hanks*, 97 F.3d 887 (7th Cir 1996), the Court held, "Were it legitimate to dismiss a claim of ineffective assistance of counsel on appeal solely because we found it improper to review appellate counsel's choice of issues, the right to effective assistance of counsel on appeal would be worthless."

Ineffective assistance of appellate counsel is "good cause" for failing to raise an issue in the appeal of right. *Edwards v Carpenter*, 529 U.S. 446 (2000), *Murray v Carrier*, 477 U.S. 478, 488 (1986); M.C.R. 6.508(D).

In *Strickland v Washington*, supra, the Supreme Court held that prejudice is shown from ineffective assistance of counsel when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S at 664.

While it is true that an attorney need not raise all arguable claims, it does not thereby follow that the attorney never need to raise any arguable claim Instead, "The question is whether a reasonable appellate attorney could conclude that [the claimed issue was] not worthy of mention on appeal."

This Court should grant the writ and upon full consideration of the merits, find that Petitioner's issues are to be heard on the merits and grant a new trial

RELIEF SOUGHT

WHEREFORE, Petitioner Freddie Nash moves this court to grant a writ of certiorari and vacate the conviction and order a new trial.

Respectfully submitted,

JAMES STERLING LAWRENCE
Attorney for Petitioner Nash
828 W. Eleven Mile Road
Royal Oak, MI 48067
(248) 399-6930

Dated. _____

APPENDIX

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED
September 15, 2005

Plaintiff-Appellee,

No 255874
Ingham Circuit Court

V

FREDDIE TRAIL NASH,

LC No.03-001003-FC

Defendant-Appellant

Before. Meter, P.J., and Murray and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, M.C L. 750 316 and possession of a firearm during the commission of a felony (felony-firearm), M C.L 750.227b. Defendant was sentenced to consecutive terms of life imprisonment for the first degree murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

I. FACTS

In the early morning of February 9, 2003, police were notified of three gunshots heard in the vicinity of Richmond and Mary Street in Lansing, Michigan. Upon arriving, police discovered the victim near her vehicle with multiple gunshot wounds. I'mogene Thomas, the mother of the victim, identified the body as her daughter, Teresa Nash. The autopsy concluded that the victim had been shot at close range three times, and that

the third and final gunshot to the victim's head was immediately incapacitating and fatal. A fresh snowfall allowed the police to photograph shoe prints at the residence of the victim, leading from the vehicle to the victim, and then away from the scene. These shoe prints were later determined to be from the kind of boots defendant was known to wear. The victim's twelve year old daughter testified that prior to the murder she had overheard a voice she identified as defendant talking with the victim downstairs at the victim's residence shortly before the gunshots. The victim's daughter also heard a cell phone ring, and she heard defendant answer the phone and say "he got this and he'll be there. He don't need no help with nothing." Testimony from a representative of defendant's cell phone company placed defendant's cell phone in the area of the murder. A Friend of the Court enforcement specialist testified that she was familiar with the victim and defendant and that there was a dispute about child support between them.

II. SUFFICIENCY OF THE EVIDENCE OF PREMEDITATION

-1-

Defendant first argues that there was insufficient evidence to support his conviction of first-degree premeditated murder, specifically contending that there was no evidence of premeditation or deliberation. We disagree.

A. Standard of Review

In reviewing a sufficiency of the evidence claim, we review "whether the evidence, viewed in a light most favorable to the people would warrant a reasonable juror in finding" that all the elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 N.W 2d 78

(2000). "The elements of first-degree [premeditated] murder are that the defendant killed the victim and that the killing was . . . 'willful, deliberate, and premeditated'" *People v Bowman*, 254 Mich App 142, 151, 656 N.W.2d 835 (2002), quoting M C.L. 750 316(1)(a) A finding of premeditation and deliberation requires there to be a lapse in time for a defendant to take a second look before acting *People v Plummer*, 229 Mich. App. 293, 300, 581 N W.2d 753 (1998). "Premeditation and deliberation may be established by evidence of '(1) the prior relationship of the parties, (2) the defendant's actions before the killing, (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide'" *People v Abraham*, 234 Mich. App 640, 656; 599 N.W 2d 736 (1999), quoting *People v Schollaert*, 194 Mich App 158, 170, 486 N W 2d 312 (1992)

B Analysis

We conclude that there was sufficient evidence that the killing was premeditated and deliberated Testimony presented at trial showed that defendant and the victim were recently divorced and were involved in a dispute over child support. Viewing the evidence favorably to the prosecution, on the morning of the murder, the victim's daughter heard the victim and defendant talking in her home and heard defendant say "he's got this and he'll be there He don't need help with nothing" The victim's daughter testified that her mother came up the stairs, grabbed her keys, said she would be right back, and presumably left with defendant. Shortly after, the victim's body was found. Additionally, the circumstances of the killing itself support a finding of premeditation and deliberation. The victim was shot three times; once at close range, which was only a flesh wound and not fatal, another time in the arm, which again was not fatal if

the bleeding would have been stopped, and another shot to the head, which the medical examiner testified would have been immediately incapacitating Witnesses who heard the gun shots testified that the shots were fired between two and five seconds apart There was also evidence of traces of blood and hair fibers found in the roof of the inside of the victim's car and the front driver's side window had been broken The victim's body was found in a front yard near where her car was found. From this evidence, the jury could have inferred that the victim was first shot in the car and that the victim was running away from the shooter when the incapacitating shot hit her in the head This would have shown that defendant thought about his choice before hand and had time to measure and evaluate this choice. *People v Morrin*, 31 Mich. App 301, 329, 187 N W.2d 434 (1971) ("To premeditate is to think beforehand, to deliberate is to measure and evaluate the major facets of a choice or problem").

-2-

III. NEW TRIAL

Defendant next argues that the trial court erred in denying his motion for a new trial. We disagree.

A Standard of Review

We review the trial court decision on a motion for a new trial for an abuse of discretion. *People v Lester*, 232 Mich App. 262, 271; 591 N.W.2d 267 (1998). In order to obtain a new trial based on newly discovered evidence, "a defendant must show that: (1) 'the evidence itself, not merely its materiality, was newly discovered', (2) 'the newly discovered evidence was not cumulative'; (3) 'the party could not, using reasonable diligence, have discovered and produced the evidence at trial'; and (4) the new evidence makes a different result probable on retrial." People

v. Cress, 468 Mich 678, 692, 664 N.W 2d 174 (2003), quoting People v. Johnson, 451 Mich. 115, 118 n 6; 545 N.W.2d 637 (1996), M C.R. 6 508(D)

B. Analysis

Defendant presented new evidence of a photograph his mother found of him wearing boots similar to, but defendant argues distinct from, a pair of boots the police believed were the same brand that made the footprints found near the victim's body. Defendant's girlfriend testified at trial that she had seen defendant wear boots similar to the ones police had obtained. After seeing this picture, she indicated in an affidavit that the shoes in the photograph were the shoes she testified about. The trial court denied defendant's motion concluding that this evidence would not have made any difference in the outcome of the trial.

We agree with the trial court's conclusion The footprint evidence was not the only piece of evidence that linked defendant to the murder. The victim's daughter testified that she heard her mother and defendant talking in her home on the morning her mother was killed. The victim's daughter testified that she heard the two talk for a while, including her mother call defendant by his name, before the victim left the home. The prosecutor also presented evidence of defendant's cell phone records, which placed defendant in the vicinity of the crime scene at the time of the murder. Regarding the actual footprint evidence, defendant's girlfriend only testified that she saw defendant wearing shoes similar to those police had obtained, which is the same testimony that she would give at a new trial. Additionally, after reviewing both the photograph of defendant wearing the shoes and the photograph of the shoes police obtained, we fail to see a

significant difference between the two In fact, the soles of the shoes appear to be quite similar As such, we agree with the trial court that defendant failed to show that this new evidence would have made "a different result probable on retrial " Cress, supra at 692

Affirmed./s/ Patrick M. Meter /s/ Christopher M Murray /s/ Bill Schuette -3-

Order
January 30, 2006

Michigan Supreme Court
Lansing, Michigan

129688

PEOPLE OF THE
STATE OF MICHIGAN,
Plaintiff-Appellant,

v.

FREDDIE TRAIL NASH,
Defendant-Appellee
/

Clifford W. Taylor
Chief Justice
Michael F Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D Corrigan
Robert P Young, Jr.
Stephen J Markman
Justices

SC: 129668
COA 255874
Ingham CC. 03-001003-FC

On order of the Court, the application for leave to appeal the September 15, 2005 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court

[SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court

January 30, 2006

/s/ Corbin R. Davis
Clerk

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

People of the State of Michigan,
Plaintiff.

-vs-

FREDDIE T. NASH,
Defendant
_____/

OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT
Docket No 03-1003-FC
HON, THOMAS L. BROWN

PRESENT: HONORABLE JUDGE BROWN
Visiting Circuit Judge

This Court, having reviewed Defendant's Motion for Relief From Judgment pursuant to M C.R. 6.500 et seq , Brief in Support, all supporting documents and correspondence, and being fully apprised of the issues, states the following:

INTRODUCTION

On April 27, 2004, Freddie Nash ("Defendant") was convicted by jury trial before the Honorable Beverley Nettles-Nickerson in the Ingham County Circuit Court of Homicide-Open Murder M.C.L 750 316-C, and Weapons Felony Firearm M C.L. 750.227B-A

On May 26th, 2004, Defendant was sentenced to a mandatory life sentence without parole for 1st degree

premeditated murder, and a 2 year consecutive sentence for felony firearm

Defendant filed his Motion for Relief from Judgment pursuant to M C.R 6.500 *et seq* , and argues that his conviction should be reversed for the following reasons (1) Alleged improper jury deliberation (2) Alleged denial of a fair and impartial jury (3) Alleged Trial Court abuse of

discretion due to "repeated" introduction of victim, crime scene, and autopsy photographs (4) Alleged error in admittance of of expert testimony (5) Various instances of alleged prosecutorial misconduct; (6) Various instances of alleged ineffective assistance of counsel; (7) The cumulative effect of the aforementioned alleged defects at his trial; and (8) Ineffective assistance of appellate counsel Defendant maintains that that these alleged errors and violations require that his convictions be vacated and that a new trial be ordered

The Michigan Court of Appeals affirmed Defendant's conviction and sentence, *People v Freddie Nash,* unpublished opinion of the Michigan Court of Appeals, decided September 15, 2005 (Docket No 255874) Defendant filed a application for Leave to Appeal with the Michigan Supreme Court The Michigan Supreme Court denied Defendant's Leave to Appeal on January 30, 2006 *People v Nash,* 474 Mich 1026 (2006).

OPINION

Defendant has the burden of establishing entitlement to the relief requested M.C R 6.508(D) This Court must examine Defendant's motion together with all the files, records, transcripts, and correspondences relating to his conviction for First Degree Murder, M.C.R. 6.504(B)(1), If Defendant's motion appears from the face of the materials that he is not entitled to relief, this Court shall deny the motion without directing further proceedings and include a concise statement of the reasons for the denial M.C R. 6 504(B)(1)-(2)

The Michigan Legislature enacted M C.L 769.26, a statute addressing errors in judicial proceeding, which reads as follows:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an
>
> 2
>
> examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice

In other words, defendants are not entitled to relief from judgment due to a harmless error

To avoid forfeiture of an unpreserved constitutional error under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error must have been plain, *i e* clear or obvious, 3) and the plain error must have affected

substantial rights of the defendant *People v Cannes,* 460 Mich. 750, 763-764 (1999) The third requirement generally requires a showing of prejudice. That is to say, the defendant must show that the error affected the outcome *Id* at 763. The Court will now consider Defendant's arguments in turn

Issue One

IMPROPER JURY DELIBERATION

Defendant argues that due to juror misconduct he was denied a fair and impartial jury. On April 26, 2004, one Juror left before the additional eleven jurors. The defendant claims that after the single juror left the room the other jurors continued to deliberate On April 27th 2004, the Defendant's counsel asked the court to grant a mistrial due to this alleged juror misconduct In response to the request the Circuit Judge brought the jury in and questioned them with regard to whether deliberation took place without the full jury present. Each juror was polled and all affirmed that there had been no deliberation without the full panel. The Circuit Court judge declared that the juror's early departure was a harmless error and denied the Defendant's request for a new trial She further stated that there was no appearance of impropriety, as deliberations stopped as soon as the juror had left the room and she had no doubt in her mind that there has been a fair and impartial, jury. Additionally, the Circuit Court judge corrected the issue by instructing the jury to start their deliberations over again The Defendant asks this Court to find

that slight jury misconduct that resulted in harmless error constitutes a reversible error worthy of a mistrial. This Court finds no such precedent that supports Defendant's contention

It has been a long standing principle that reversal for a new trial does not follow automatically from a showing of error in the court of a generally fair trial. The error which calls for a new jury trial must be one of such significance as to have prejudiced the result *Cooper v Tranter Mfg*, 4 Mich App 71 (1966), quoting *Miskiewicz v Smolensi*, 249 Mich. 63 (1929). In showing significant prejudice with respect to juror misconduct, the defendant has the burden to prove that such misconduct may have had a influence upon the final result, and caused injury to the complaining party. *Russel v Pere Marquette Ry Co*, 245 Mich 624 (1929). Trial courts have broad discretion in determining if the defendant has meet this burden, and in deciding whether to grant a new trial on account of juror misconduct. Impliedly, a verdict does not have to, and should not be set aside for every trifling misconduct of a juror, which occurs without the fault of the prevailing party *Cooper v Carr*, 161 Mich 405 (1910).

Under the facts of this case, it is clear that the early departure of one juror did not cause prejudice. There is no evidence that the eleven remaining juror's continued to deliberate the verdict after the single juror left the room. Conversely, the record shows that every juror member responded under oath that there was no further deliberation after the juror left the jury room and that there had never been any deliberation with out the full

panel. Additionally, to make sure that the absence of the juror did not have a influence on the final result, the Circuit Court judge took affirmative measures in order to correct any potential error by ordering the jury to start their deliberation from scratch This Court is satisfied with the Trial Court's conclusion that jury misconduct resulted in harmless error and find that the substantial rights of Defendant have not been affected.

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Issue Two

FAILURE OF TRIAL COURT IN REFUASAL (sic) TO EXCUSE JURORS

The Michigan Court of Appeals has ruled that a new trial must be granted when it is shown that a juror gave untruthful answers during voir dire and truthful answers would have revealed grounds for successful challenge for cause. *Collier v Westland Arena, Inc,* 183 Mich. App. 251(1990); *Citizens Commercial and Sav Bank v Engberg,* 15 Mich. App. 251(1968). Furthermore, when a court discovers a juror's false statements on voir dire after trial and verdict, a party moving for new trial must present to the court something more than the mere fact of falsity of answers and must present proof of actual prejudice on part of that juror or establish that that juror was unqualified This is done by showing either actual prejudice or by establishing to the satisfaction of the trial court that the moving party would have successfully challenged for cause or otherwise dismissed the juror in question had the truth been revealed prior to trial *Gustanfson v Morrison,* 57 Mich. App. 655 (1975)

Under the facts of this case, there has been no showing of actual prejudice, nor has the Defendant established that he would have been successful in challenging for cause One of the jurors that the defendant is challenging did not even deliberate in this case Additionally, the record shows that the defendant had the opportunity to consult with his attorney if he should file a motion to have the second Juror removed from the jury for cause and the Defendant chose not to file a motion for removal (T, III, 358). Furthermore, both jury members which the defendant has called into question testified before the trial judge that prior relationships would not impair their ability to be impartial to the Defendant in this case Therefore, the Defendant's arguments are without merit and he is not entitled to relief on this issue.

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Issue Three

INTRODUCTION OF COLOR PHOTOGRAPHS OF THE HOMOCIDE VICTIM

The law with regard to the admission of photographs is well settled. The admission of photographs into evidence of corpses of homicide victims is a matter addressed to the sound discretion of the trial judge, so long as such photographs are not offered with sole intention of inflaming the jury. *People v Fuzi,* 116 Mich. App. 277 (1982), *People v Hall,* 83 Mich App. 632 (1978). Specifically, the Michigan Court of Appeals has held that photographs of homicide victims are admissible if helpful in illuminating any material point in issue *People v Champion,* 452 Mich 92 (1980); *People v Bergin,* 63 Mich. App. 526 (1969); *People v Rogers,* 248 Mich. App 702 (1968) The trial court

must determine whether the pictures are "substantially necessary or instructive to show material facts or conditions", or whether they are merely "calculated to excite passion and prejudice" *People v Falkner,* 389 Mich. 682 (1973).

Defendant's argument that the photos of the victim were of no significance to the case and were used for the sole purpose to inflame is incorrect. In a criminal case, the burden in upon the People to prove every element of the crime charged While the pictures of the victim shown are not by any means pleasant, the photographs showed the victim as she was found and at various stages of the autopsy. The pictures depict the corpus delicti. Specifically the photographs were relevant to the issue of premedication (sic) and cause of death *People v Full-wood,* 51 Mich App. 476 (1974), Therefore the Trial Judge did not abuse her discretion in either her decision to admit the photographs or in the manner in which they were displayed. *People v Nard,* 78 Mich App 365(1977).

This Court has reviewed and finds no merit in Defendant's claim that the introduction of

color photograph of the homicide victim was abuse of discretion by the trial court.

Issue Three

EXPERT TESTIMONY

Defendant argues that the trial court committed reversible error in allowing expert testimony under M.R.E. 702. This, issue alleges grounds for relief which were decided against the

Defendant in a prior appeal, and there has been no retroactive change in the law that would undermine the previous decision, *People v Freddie Nash,* unpublished opinion of the Michigan Court of Appeals, decided September 15, 2005 (Docket No. 255874) Therefore, the Defendant is not entitled to relief on this issue pursuant to M C R. 6 508(D)(2).

Issue Four

PROSECUTION FAILED TO COMPLY WITH THE RULES OF DISCOVERY

Defendant argues that the Prosecutor violated discovery rules by not providing the defense with witness testimony that Defendant's voice and cellular phone ring tone were identical to those she heard the night the victim was murdered.

Defendant's argument is misguided This information was available to the Defendant and counsel during trial, is not new evidence, and its exculpatory value is speculative at best. "There is no general constitutional right to discovery in a criminal case." *People v Elston,* 462 Mich. 751, 765 (2000). Moreover, due process requires only that the prosecution provide a defendant with material, exculpatory evidence in its possession. *People v Stanaway,* 446 Mich 643, 666 (1994). Upon examination of the record, it is clear that the Defendant was given the opportunity to probe the witness evidence for authenticity and accuracy before and during trial Therefore, this Court finds no plain error affecting the substantial rights of the Defendant on this issue.

Issue Five

PROSECUTORIAL MISCONDUCT

Defendant claims that the prosecutor mischaracterized events by introducing testimony from a Friend of the Court Enforcement Specialist witness. The witness testified that the Defendant had become angry and animated during their prior discussion regarding child support and that the issue had not been resolved at the time of the victims' death. Defendant argues that this testimony was a misrepresentation of fact in the prosecution's attempt to establish a motive of the crime.

Defendant's arguments are without merit. In the case at bar, the statements of the prosecutor and the witness testimony of the Enforcement Specialist were not character evidence. Character evidence includes evidence of other crimes, acts or wrongs *People v Starr*, 457 Mich. 490, 495 (1998). The prosecutor in this case was using the testimony of the Enforcement Specialist to establish motive for the crime, not to show propensity to commit a crime. Evidence that has any bearing on the intent or motive with which a crime was committed is admissible so long as it is within safe bounds of relevance. *People v Jones*, 293 Mich. 409 (1940), *People v Weatherspoon*, 6 Mich. App. 233, (1967). Under the Michigan Rules of Evidence, M.R.E. 404 provides in relevant part, "(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." The evidence in this case was not used for the purpose of proving acts in conformity therewith. It was used to show Defendant's

motive in committing the instant offense Additionally, the evidence was not evidence of other crimes, acts, or wrong doings Even if it were such evidence, it was used to show motive, a permissible use under M R E. 404(b)

Furthermore, evidence of a financial condition may be admissible to show motive in the

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circumstances of a particular case *People v McWhorter,* 150 Mich. App. 826 (1986).

It is obvious in this case that the prosecution used the witness testimony to establish motive, and not to establish the defendants character Therefore, this Court finds no plain error affecting the substantial rights of the Defendant on this issue

Issue Six

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Defendant claims that his trial counsel was ineffective in failing to file for change of venue Two approaches have been used to determine if the defendant was entitled to a change of venue "(I) when there has been found where there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted, and, much more infrequently, (2) community bias has been implied from a high percentage of the venire who admit to a disqualifying prejudice " *People v Jendrzejewski,* 455 Mich 495 (1997). Defendant argues that a change of venue was warranted based on pretrial publicity; however, the existence of pretrial publicity alone does not necessitate a change of venue. *Id* at 502. In determining whether a defendant has been deprived a

fair trial by virtue of pretrial publicity, the reviewing court must consider the totality of the circumstances and determine whether the pretrial publicity was so unrelenting and prejudicial that "the entire community is presumed both exposed to the publicity and prejudiced by it." *Id* at 501-502.

On appeal Defendant asserts that there were reports in the newspapers and local television programs In *People v Delisle*, 202 Mich App 658 (1993), the Michigan Court of Appeals rejected the defendant's argument that the trial court erred in denying his motion for a change in venue based on pretrial publicity when there were more then 100 newspaper articles published over a period often months about the case.

The *DeLisle* Court concluded that the

relevant question is whether the circumstances surrounding the publicity rendered the possibility of receiving a fair trial by an impartial panel unlikely.

After examining the record of the entire voir dire, this Court has determined that a impartial jury was impaneled in this case There was sequestered questioning of potential jurors regarding their previous knowledge about the case and their ability to remain unbiased. While it may be some minimal cause for concern that some of the members of the venire were at least familiar with the basic facts of the case, it is not required that the jurors be totally ignorant of the facts and issues involved "In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse

interest in the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case [T]o hold that the mere existence of any preconceived notion as to the guilt or innocent of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court " *Irvin, Supra* at 531

This Court finds that there was no community prejudice resulting in a actual bias against the Defendant, therefore this Court denies defendant's allegation of denial of effective counsel based on failure to object to venue.

Next, Defendant asserts that his trial counsel was ineffective in failing to object to the instances of alleged prosecutorial misconduct discussed in the previous section Because this Court has found no merit to Defendant's contentions of misconduct, there is no need to examine whether his trial counsel was ineffective in failing to object. Counsel does not render ineffective assistance by failing to raise futile objections *People v Hawkins*, 245 Mich App 439, 457 (2001).

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Therefore, this Court finds no plain error affecting the substantial rights of the Defendant on this issue

Lastly, Defendant argues that his trial counsel was ineffective and committed reversible error by failing to present

expert testimony The Defendant claims that a child witness had been coached, and that it was the duty of his trial attorney to call a expert witness in order to educate the jury as to the suggestibility of child witnesses, and how they are easily manipulated in certain circumstances

Allegations pertaining to ineffective assistance of counsel must first be heard by the trial court to establish a record of the facts pertaining to such allegations. *People v Ginther*, 390 Mich. 436, 443 (1973). In cases such as this, where a *Ginther* hearing has not been held, review is limited to mistakes apparent on the record. *People v Price*, 214 Mich App 538, 547 (1995) To prevail on a claim of ineffective assistance, a defendant must, at a minimum, show that (1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability that the outcome of the proceeding would have been different but for trial counsel's errors *People v Kevorkian*, 248 Mich. App 373, 411 (2001). A difference of opinion as to trial strategy does not amount to ineffective assistance of counsel. *People v Peery*, 119 Mich. App. 207, 216 (1982). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise *People v Stanaway*, 446 Mich. 643, 687 (1994).

Defendant has failed to carry his burden of showing that his counsel was ineffective. Defendant has not shown that counsel's performance was below an objective standard of reasonableness, or a reasonable probability that the outcome of the trial would have been different but for any errors of counsel. The difference of opinion as to whether counsel should have

called a child witness expert is one of trial strategy, and this does not amount to ineffective

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assistance Therefore, this Court finds no plain error affecting the substantial rights of the Defendant on this issue

Issue Seven

CUMULATIVE EFFECT OF ERRORS AT TRIAL

This Court finds no merit to any of the Defendant's claims regarding impropriety at his trial, therefore, it is not necessary consider the cumulative effect of errors, as no errors have been shown

Issue Eight

DEPRIVATION OF EFFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL

Defendant argues that his appellate counsel was ineffective in failing to issues in his first appeal of right. "Effective assistance of counsel does not require counsel to raise every arguably meritorious issue on appeal, requiring appellate counsel to raise every arguable claim would impair independence of the legal profession, destabilize finality of judgments, and exponentially increase burdens on appellate counsel " *People v Reed,* 449 Mich 375, 379 (1995). In order to establish ineffective assistance of appellate counsel, "the movant must establish ineffective assistance of counsel pursuant to the standard in *Strickland v Washington " Id* at 382. Under *Strickland,* the defendant must satisfy a two-pronged test of both cause and prejudice To show cause, the Defendant must show that counsel

"made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment" *Strickland v Washington,* 466 U.S. 668 (1984)

As stated above, there are no grounds for relief when appellate counsel did not raise every arguably meritorious issue. Because this Court finds no merit to any of the issues presented on this motion, it can not be said that appellate counsel failed to raise any arguably

meritorious issues. Defendant has not shown the requisite cause needed to establish ineffective assistance of counsel; therefore, there is no need to address prejudice Based on the foregoing, this Court finds no plain error affecting the substantial rights of the Defendant on this issue

ORDER

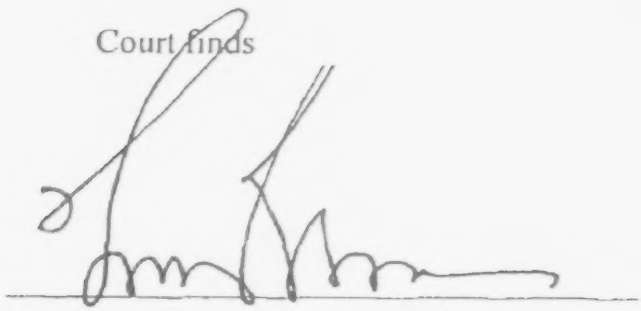
THEREFORE, IT IS ORDERED THAT:

Defendant's Motion for Relief From Judgment is **DENIED.**

In compliance with M.C.R. 2.602(A)(3), this Court finds that this decision resolves the last pending claim and closes the case

Dated 29 Dec, 2008

Court finds



HON. THOMAS BROWN Circuit Judge

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Court of Appeals, State of Michigan

ORDER

People of MI v. Freddie T Nash,

Docket No. 295819

LC No 03-001003-FC

Donald Gibson
Presiding Judge

William C Whitbeck

Alton T Davis

Judges

The Court orders the delayed application for leave to appeal is DENIED for failure to meet the burden of establishing entitlement to relief under M C.R. 6.508(D)

SEAL A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on March 12, 2010

/s/ Sandra Schultz Mengel

Order **Michigan Supreme Court**
October 26, 2010 **Lansing, Michigan**

140950

Clifford W Taylor
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P Young, Jr
Stephen J Markman
Justices

PEOPLE OF THE
STATE OF MICHIGAN,
Plaintiff-Appellant,

v.

FREDDIE TRAIL NASH,
Defendant-Appellee

SC: 140950
COA: 295819
Ingham CC: 03-001003-FC

/

On order of the Court, the application for leave to appeal the March 12, 2010 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under M.C.R 6.508(D)

DAVIS, J, not participating I recuse myself and am not participating because I was on the Court of Appeals panel in this case See M.C R. 2.003(B).

[SEAL]

I, CORBIN R DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

October 26, 2010 /s/ Corbin R. Davis
Clerk

Woman's ex-husband faces murder trial April 19

By Tracy Burton
Lansing State Journal

"To whom this may concern:
"I was really hurt when I lost my mom. It was like losing my heart because when I heard that my mom died my heart shattered."

The handwritten letter is worn from the dozens of times Ra'eesa Cannon of Lansing has folded and unfolded it in the past year.

Putting her feelings on paper is one way 12-year-old Ra'eesa copes with her mother's death.

"My mom was intelligent and was a beautiful woman working on her Master's degree and a wonderful mother that no one can replace."

Teresa Nash, 34, was shot to death near her Risdale Avenue home in Lansing in February 2003.

She left behind six children, and was six months pregnant with a girl.

Under grandma's eyes: Nine-year-old Muhammad Cannon plays with a Game Boy as his grandmother Imogene Thomas watches on the sofa in the family room.

Mourning the loss of her daughter, 53-year-old Imogene Thomas, suddenly found herself raising another generation.

Through prayer and love, the full-time General Motors Corp. worker holds the family together.

Nash's ex-husband, Freddie Nash, is charged with murder and is set to go to trial April 19.

See Family, Page 5A

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Newspaper Articles

Friday 4-23-04

'She said she'd be right back,' girl testifies of slain mother

Daughter heard shots after mom left, says murder suspect at house earlier

By Kelly Hassett
Lansing State Journal

"She said she'd be right back."

That's the last thing 12-year-old Ra'eesa Cannon heard from her mother, Teresa Nash, hours before she was fatally shot outside their Lansing home.

T. Nash

The sixth-grader took the witness stand Thursday to testify against the man investigators say killed her mother in February 2003.

Freddie Nash, 26, of Lansing is on trial in Ingham County Circuit Court, accused of killing his pregnant ex-wife and mother of six. They had one child together — Ra'eesa's half sister.

Freddie Nash has denied killing 34-year-old Teresa Nash, an accountant with Lansing's Board of Water & Light.

Ra'eesa, whose braided head of hair barely rose above the witness stand microphone, told the jury and Judge Beverley Nettles-Nickerson that she heard her mother

See Trial | Page 8A

Nash murder trial

▸ The trial for Freddie Nash, 26, of Lansing continues today in Ingham County Circuit Judge Beverley Nettles-Nickerson's court. Nash is charged with murder in the Feb. 9, 2003, shooting death of his pregnant ex-wife, Teresa Nash, 34.

Trial: Girl says she tried to call mom

CONTINUED FROM 1A

and Freddie Nash talking in the downstairs living room of Teresa Nash's Risdale Avenue home.

That was either late Feb. 8 or early Feb. 9, she testified.

Ra'eesa

"He was talking about how sorry he was and how much more responsible he should have been," Ra'eesa said in a soft but steady voice.

While her siblings slept in their rooms, Ra'eesa fell asleep in her mother's bedroom and at some point woke up when Teresa Nash came upstairs, grabbed her car keys and told Ra'eesa she'd be right back.

She told the jury she fell back asleep and didn't stir again until she heard gunshots in the street.

Her mother wasn't there when Ra'eesa woke up that next morning. She told the jury she looked out the window and saw police cars and officers outside her house.

Afraid for her mother's safety, Ra'eesa dialed Teresa Nash's cell phone three times. And three times she got no answer.

At about the same time, police found the body of Teresa Nash at Richmond Street and Mary Avenue, a few blocks from her home. She was shot in the head.

times she got no answer.

At about the same time, police found the body of Teresa Nash at Richmond Street and Mary Avenue, a few blocks from her home. She was shot in the head.

Joseph Brehler, Freddie Nash's attorney, asked Ra'eesa if she had talked many times with Freddie Nash either before or after he lived with her and her mother for less than two weeks in 2000.

Ra'eesa testified that she didn't know Freddie Nash before he moved in with them in 2000 and that she'd barely talked with him since he moved out.

F. Nash

Brehler also asked Ra'eesa if she heard her mother and Freddie Nash laughing during their conversation that night before her mother died. She answered yes.

After her testimony Ra'eesa sat with her grandmother, Imogene Thomas, who wrapped her arm around the child's shoulders and pulled her close. Ra'eesa and three of her siblings now live with Thomas, Teresa Nash's mother.

Freddie and Teresa Nash had an ongoing custody dispute and were in court for a hearing about a week before Teresa Nash was killed, Tarra Muhammad, an advocate with Ingham County's Friend of the Court, testified Thursday.

The trial continues today at 8:30 a.m. in Ingham County Circuit Court.

Contact Kelly Hassett at 267-1301 or khassett@lsj.com.

Ex-husband's trial begins in woman's death

Prosecutor says cell phone calls put him at scene

By Kelly Hassett
Lansing State Journal

The noise that jarred Sandra Wolfe awake early Feb. 9, 2003, sounded like cannons.

Douglas Hulbert heard three loud booms.

What roused them and other Richmond Street residents from sleep that morning turned out to be gunshots from the street — gunshots that killed Teresa Nash, a pregnant mother of six children.

Wolfe and Hulbert's testimony came Tuesday in the trial for Nash's ex-husband, Freddie Nash, who is charged in her death.

Assistant Prosecutor Sam Smith told jurors in his opening statements they would hear evidence on cell phone records that place Freddie Nash at the scene.

"Right at the time of the murder, the defendant is making calls — from exactly the area where Teresa lived and where she was killed," he said.

F. Nash

T. Nash

Joseph Brehler, Freddie Nash's attorney, waived his opening statements. He has denied that Freddie Nash shot Teresa Nash. At least 10 witnesses testified Tuesday in Judge Beverley Nettles-Nickerson's court.

Just after 6 a.m. on Feb. 9, 2003, Wolfe jumped up and looked out her bedroom window after she heard the shots, she testified. She saw what she thought was a man running up Mary Avenue.

"I went outdoors to let police know I saw someone running right after the shooting," she said.

Hulbert testified he saw an SUV rammed against a light pole — running but empty.

Teresa Nash's body was found at Richmond Street and Mary Avenue, just a few blocks from her Risdale Avenue home. She was shot in the head.

Freddie Nash, 26, faces up to life in prison if convicted. He is in Ingham County Jail on a $300,000 bond.

Contact Kelly Hassett at 267-1301 or e-mail khassett@lsj.com.

What's next

- Freddie Nash's trial continues Thursday in Ingham County Circuit Court.

Ex-husband charged in slaying of mother of 6

Police believe man, 26, shot his former wife

By Kelly Hassett
Lansing State Journal

A 26-year-old man was charged with murder Tuesday in the February shooting death of his ex-wife, Ingham County prosecutors said.

Freddie Trail Nash is scheduled to be arraigned this morning in Lansing District Court on a murder charge in the Feb. 9 shooting of Teresa Nash, a pregnant mother of six, said Chief Assistant Prosecutor Joyce Draganchuk.

T. Nash

The Ingham County Prosecutor's office authorized the arrest warrant Monday, and Nash was arrested Tuesday, Draganchuk said.

"We've been working with the police (until) we felt we had enough for a warrant," she said. "It's been an ongoing investigation."

He is being held without bond in Ingham County Jail. It was unknown whether he has an attorney.

Teresa Nash, 34, was shot in the head and found on Avenue, a few blocks from her home.

Police dogs traced the killer's scent to the 1300 block of Pierce Road, where police believe a driver — who likely knew nothing about the crime — picked up Freddie Nash.

Teresa Nash's children range in age from 1 to 18, and she was five months pregnant when she was killed.

She had just begun work as an accountant with the Lansing Board of Water and Light.

The victim's mother, Pinogene Thomas, could not be reached for comment Tuesday night.

Draganchuk would not speculate on a possible motive, but said Teresa and Freddie Nash do have a child together.

Unfortunately, "it's not so uncommon to see domestic homicides," she said.

Nash is also charged with possessing a firearm during the commission of a felony.

He faces up to life in prison if convicted of murder.

Contact Kelly Hassett at

What's next

Freddie Trail Nash, 26, is scheduled to be arraigned this morning in Lansing District Court on a murder charge in the Feb. 9 shooting of his ex-wife, Teresa Nash, 34

No. _____

IN THE SUPREME COURT OF
THE UNITED STATES

FREDDIE T. NASH

Petitioner,
-v -

STATE OF MICHIGAN
Respondent.

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 8,878 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct Executed on January 19, 2011

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